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IN THE

Supreme Court of the United States

October Term, 1964

No. 1052

Samuel B. Lewis, Petitioner,

v.

Secretary of the Treasury of Commonwealth of Kentucky, a Body Corporate, Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT IN OPPOSITION

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May 1964

Phoenix Printing & Lithographing Co., Washington, D.C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1052

JESSIE E. JONES, *Petitioner*,

v.

PRESIDENT AND DIRECTORS OF GEORGETOWN COLLEGE, INC., a Body Corporate, *Respondent*.

Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals for the District of Columbia are not yet reported. They are printed, however, in the Appendix to the Petition herein.

JURISDICTION

The order appealed from was granted by Judge Wright of the Court of Appeals on September 17, 1963. Petition for rehearing *en banc* was denied February 3, 1964. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

Whether Judge Wright of the Court of Appeals abused his discretion in granting an order pursuant to § 1651 Title 28 U.S.C., permitting respondent to give petitioner a blood transfusion necessary to save her life in order to maintain the *status quo* and protect the appellate jurisdiction of the Court of Appeals for the District of Columbia.

STATUTES INVOLVED

The pertinent statute is 28 U.S.C. § 1651:

"§ 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction."

STATEMENT OF THE CASE

The respondent adopts for its Statement of the Case the facts as found in the Memorandum Opinion of Judge Skelly Wright filed September 19, 1963, and included as Exhibit B to the Petition for Certiorari, pp. 35a-38a. The respondent further notes that the petitioner was released from the hospital on September 25, 1963, on the ground that she no longer required hospital care and confinement. See Affidavit of Peter R. Taft attached hereto, *infra*, p. 6a.

ARGUMENT

When the petitioner filed her brief for rehearing *en banc* in the Court of Appeals, she attempted to waive any issue of procedural irregularity and went directly to the merits of any final decision permitting a hospital to give blood transfusions over the religious objection of a patient faced with imminent death. Once again, in the Petition for Certiorari, the petitioner has argued only the merits of such a final order. The procedural context of this case, however, may not be so ignored.

The Merits of the Dispute Between the Parties Are Not Before This Court

The sole issue presented in this case is the power of Judge Skelly Wright to issue an order pursuant to 28 U.S.C. § 1651 to protect the appellate jurisdiction of the Court of Appeals for the District of Columbia. The standards applicable to that question and the propriety of such action in this case are fully set forth in the opinion filed by Judge Wright on February 3, 1964. Respondent does not believe that it can improve upon either the analysis or authority found therein and relies wholly on this opinion to support the legality and propriety of the action taken in this case. The respondent will therefore confine itself to a discussion of the procedural ramifications of the steps taken in this case.

The legal relationship between the parties in this case arose when the petitioner voluntarily submitted herself to the emergency care of the respondent's hospital. At stake was petitioner's life. At this point it was not open to the respondent to terminate the legal relationship which had arisen. As noted by

Judge Wright, "the Hospital was faced with the choice of turning the patient out of the Hospital for failure to accept medical treatment, which of course was impossible because of her condition, letting her die in bed, with whatever responsibility that would entail, or administering the blood." Petition, p. 37a. The full extent of the legal rights and duties of the parties at that juncture were yet to be fully probed. However, as noted in the various opinions of the Court of Appeals and in the brief of the respondent filed in opposition to the petition for rehearing *en banc* in the Court of Appeals and printed herein as Appendix A *infra*, there were extensive risks to the respondent of both civil and criminal liabilities which may or may not be affected by a waiver signed by the petitioner on her husband. Petition, pp. 12a, 19a-23a, 29a-32a; see also *infra* p. 3a. Faced with this legal jungle, respondent applied *ex parte* to the Federal District Court for a declaration of its rights and an order permitting it to give blood transfusions over the objection of the petitioner. The requested relief was denied. Petition, pp. 33a-34a. Respondent then applied to Judge Skelly Wright of the Court of Appeals of the District of Columbia for an emergency writ pursuant to 28 U.S.C. § 1651 for such minimum relief as was necessary to prevent the mooting of the issue by petitioner's death. This application was also *ex parte* in the sense that petitioner was not represented by legal counsel. See Petition, p. 27a, 36a. The requested relief was granted.

At this point the petitioner and the dissenters in the Court below claim that the relief granted by Judge Wright was final and the issue made instantly moot. Petition, pp. 28, 15a. This, however, is not true. Nor

is it in any sense comparable to the mootness which would have attached upon petitioner's death. The record indicates that petitioner remained in respondent's hospital for a total of nine days during which time the legal relationship of the parties continued unchanged. Ever present was the possibility that gastrointestinal bleeding would recur, bringing on the need for further transfusions. Moreover, the relief granted pursuant to Judge Wright's order involved not just one but a series of transfusions over several days until petitioner's life was out of danger. Petition pp. 20a-21a. During those nine days, therefore, mootness could not possibly attach to the relationship between the parties.

The purpose of Judge Wright's order was to protect the appellate jurisdiction of the Court of Appeals for the District of Columbia. Since the merits of the case were not yet before the Court of Appeals, it was up to the parties to pursue their remedies in the trial court until an appealable order was obtained. Both parties had remedies for pursuing this objective. At least two alternatives were available to the respondent. First, since the initial application in the District Court was made *ex parte*, respondent could have renewed its application with the request for a hearing wherein both parties could present their positions on the merits more fully and prepare a suitable record for appeal by the losing party. Second, respondent might have appealed directly the denial by Judge Tamm of its original application on the ground that under the circumstances his order was final. Similar alternatives were also available to the petitioner had she felt that the respondent was not diligently pursuing the presentation of the case on the merits. The

petitioner could have counterclaimed in the District Court to enjoin the respondent from giving further transfusions. The granting or denial of such relief would have set the stage for proper appellate review. The pursuit of any one of these alternatives by either party would have properly presented the merits of this case for appellate review in accord with the objective of Judge Wright's order. Any one of these remedies could have been completed within the nine days during which petitioner remained in respondent's hospital.

Moreover, as noted by Judge Wright, the petitioner could have sought an immediate modification of Judge Wright's order by motion before the Motions Division of the Court of Appeals. Petition, pp. 20a-21a.

In fact, neither party took any further action with respect to the merits of the dispute between the parties. Not only are the merits not before this Court, but they have not and cannot now be presented to the Court of Appeals.

The Issues Presented by This Case Are Not Yet Ripe for Review

This case presents a study in the ability of the judicial process to adapt to circumstances requiring emergency action. The case is one of first impression; the issues presented are complex; research and precedent on them was nonexistent at the time when action was required. At the very moment when life was literally flowing from the petitioner, attorneys for the respondent placed on the shoulders of Judge Skelly Wright the responsibility for either letting the petitioner die or deciding "to sign the order to save the patient's life, in the event that subsequent research supported its [the Court's] authority so to do." Petition p. 37a-38a.

Judge Wright's choice was not an enviable one. To abdicate judicial authority to act under such pressure was to admit that the judicial process is incapable of adapting to the fast pace of modern life. It would also decide the merits of the case in the petitioner's favor without any opportunity for the parties to have a full hearing. At such a moment, a judge must act on the basis of intuition gained through his experience both as a judge and as a man. No man is more qualified than Judge Skelly Wright to accept such responsibility. His judicial instincts have been tempered by a broad range of judicial experience and may be relied upon to choose the correct judicial course when the speed and power of events require immediate action. As he concluded after a hearing at the petitioner's bedside, he had to act on the side of life.

The meaning and context of Judge Wright's action have since been clarified both procedurally and substantively. Upon occurrence of a similar crisis, either with the same parties or any others, those involved will have the benefit of this case. The parties involved can make procedural moves with assurance along paths already set forth. The judge called upon to act in such a crisis will act with the benefit of the research done in this case and the many law review commentaries now being completed on this case. The merits of the dispute between the parties can then be properly presented in a trial court and appealed in the normal course of litigation. At such time the issues involved will be sufficiently clarified to permit this Court to act should it so desire. It is unfortunate that the speed of events and the uncertainty of the paths being charted by the parties in this case of first impression may have prevented the petitioner from

presenting the merits of her dispute to this Court. Nevertheless, she has contributed to the development of the judicial process to handle an emergency situation likely to occur among members of her religious faith. Her contribution will permit the presentation of the merits of her claim in other actions. It is fortunate that her contribution has been made without cost of her religious scruples, Petition, p. 32a, or her life.

Moreover, if the issues involved in this case are of substantial importance to the legal fabric of this country, then other cases will arise in which the issues are better presented and will indeed be ripe for this Court's review. If these issues do not recur in other cases, then this case is not of sufficient juridical importance to justify the time and attention of this Court at this time or any other.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

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Counsel for Respondent

May 1964